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Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime
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Items 3 and 4 of the provisional agenda*
Consideration of the draft United Nations Convention against Transnational Organized Crime, with particular emphasis on articles 4, 4 *bis*, 7 and 8
Consideration of the additional international legal instrument against illicit manufacturing of and trafficking in firearms, their parts and components and ammunition

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* A/AC.254/12.

II. Proposals and contributions received from Governments

Belgium

[Original: French]

Comment on Article IV (Scope of application) of the draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and Other Related Materials, Supplementary to the United Nations Convention against Transnational Organized Crime

In view of the subject matter dealt with in this Protocol, the Ad Hoc Committee should give consideration to the insertion of a safeguard clause in respect of international humanitarian law for situations involving armed conflict, in particular domestic armed conflict, within the meaning ascribed to those terms by international humanitarian law.

South Africa

[Original: English]

Comments and proposals on the draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and Other Related Materials

Overall, the proposed protocol prepared by Canada should be commended for setting out the key steps necessary in beginning to gain control over the illicit manufacturing of firearms and ammunition and the trafficking in those commodities.

The draft protocol follows closely the Inter-American Convention against the Illicit Production of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials of the Organization of American States (OAS).

The OAS Convention was supported by Canada, Mexico and the United States of America, in addition to other countries in the Americas. As the first convention of its kind, it was quickly seen as a prototype for future conventions. The concept of a global convention to curb arms trafficking was mooted in 1998 and the draft protocol is the first practical realization of that suggestion. One concern that has been raised with regard to the protocol is that it will diminish future efforts to elaborate an international instrument on arms trafficking. That is a valid point. Though the idea of elaborating such an international instrument should not be lost, the proposed protocol should not be diminished because of that idea.

Preambular section

It is suggested that a preambular paragraph similar to that in the OAS Convention be inserted between existing preambular paragraphs (e) and (f) on achieving control over firearms in post-conflict situations, given the importance of this in the African context.

The preambular paragraph in the OAS Convention could be modified as follows:

"Stressing the need in peace processes and post-conflict situations, to achieve effective control of firearms, ammunition and other related materials in order to prevent their entry into the illicit market,"

Article I: Relationship with the United Nations Convention against Transnational Organized Crime

In referring to the protocol as a "supplement" to the United Nations Convention against Transnational Organized Crime, its importance is diminished. The article could simply read:

"This Protocol to the Convention ..."

Article II: Definitions

The definitions of ammunition, controlled delivery and illicit manufacturing are accepted as they appear.

"Illicit trafficking"

The United States has suggested that the definition of illicit trafficking be expanded to include the failure to mark imported firearms and the obliteration of serial numbers. Should this amendment be tabled, South Africa will support it.

"Other related material"

It is suggested that the phrases "essential to its operation" and "enhance its lethality" both be removed from this definition. The ability of a part to enhance the lethality of a firearm is extremely subjective, while the definition of what is essential to the operation of a firearm limits what could be covered in the protocol.

Article III: Purpose

The purpose of the protocol as it currently appears does not include what should be the outcome of such a protocol: combating and preventing illicit manufacturing of and trafficking in firearms, ammunition and other related materials. It is suggested that this be added.

Article IV: Scope

It is recommended that the words "commercially traded" be removed from this definition as they unnecessarily limit the scope of the protocol and may create loopholes that could be exploited.

Article V: Criminalization

It is suggested that the words "when committed intentionally" be removed from paragraph 1 of article V.

It has also been suggested that a paragraph be included on United Nations arms embargoes. The United States has proposed the following language:

"States Parties that have not yet already done so shall adopt the necessary legislative or other measures to sanction criminally, civilly or administratively under their domestic law the violation of arms embargoes mandated by the United Nations Security Council."

Article VII: Confiscation or forfeiture

It is suggested that article VII, paragraph 2, be amended to include the destruction or rendering unusable of illicitly manufactured or trafficked firearms.

It is also suggested that article VII be retained, given its specific focus, with necessary modifications in the light of the development of the convention itself.

Article VIII: Record-keeping

While it is recognized that computerized record-keeping is the best method, paragraph 3 of article VIII may meet with resistance. South Africa supports the paragraph as it appears. There should be attempts to ensure the compatibility of computer systems at least within regions.

Article IX: Marking of firearms

It is suggested that paragraph 2 of article IX be modified to include language on "developing effective and inexpensive measures to mark firearms".

Article XI: General requirements for export, import and transit licensing or authorization systems

Currently South Africa meets the requirements mentioned in article XI and has no objections to the language as it appears. However, the United States may propose that two additional paragraphs be added to article XI to systematize the export/import process and to prevent the unauthorized re-export of firearms. South Africa will accept those two amendments, pending the presentation of the proposed text.

Article XIV: Exchange of information

It is suggested that article XIV, paragraph 3, be amended to include a reference to the Interpol Weapons and Explosives Tracking System (IWETS) database as one means of cooperating in the tracing of firearms, ammunition and other related materials.

Other areas for consideration

One flaw in the protocol in its current form is that it offers no facilitating or enforcement mechanism. The OAS Convention calls for the creation of a consultative committee whose responsibilities will include facilitating the exchange of information on legislation and administrative procedures among parties to the Convention and promoting training and technical assistance. While such a committee would probably not work within the United Nations Convention, it is suggested that some type of focal point within the system be considered.

The United States has suggested the creation of a "United Nations transnational firearms transfer centre" to undertake such a function. While that may be unlikely, at least the identification of a focal point within the United Nations system should be made in order to facilitate the flow and exchange of information.

It has also been proposed by the United States that the protocol include an article on registering and licensing brokers. Given that the South African Government is currently considering including legislation on arms brokers, it seems that such an article could be accepted by South Africa, depending on its final language. It also appears that the European Union may table language on arms brokering.

Conclusion

The protocol represents the first international attempt towards reducing the trafficking in and manufacture of illicit firearms. However, the lack of a United Nations focal point must be addressed. It is equally important that the purpose of the protocol be made explicit, as suggested. South Africa intends to actively participate in the further refinement of the protocol and to use its experience and expertise in the eventual implementation of the proposed Convention.

Spain

[Original: Spanish]

Article 4
Money-laundering

Paragraph 1

1. Spain considers that the final phrase of the *chapeau*, which reads "when committed intentionally", should be deleted on the ground that it excludes from the definition of money-laundering the element of "negligent laundering", whose establishment as a criminal offence, albeit debated in theoretical terms, would appear to be aimed at laying down penalties in respect of cases in which bank and financial operatives fail to exercise due diligence, as an inherent part of their duties, in preventing money-laundering from taking place, provided that such failure constitutes negligence of a degree deemed to be serious.

2. Subparagraphs (a), (b) and (c) of option 1 contain the words: "knowing that such property is the proceeds of crime". Spain is of the view that that wording needs to be amplified by specifying what category of offences constitute those which could provide the basis for money-laundering to take place; the present wording, whereby the property to be laundered is the proceeds of crime, is too ambiguous, as it is broad enough to accommodate any of the statutory offences established in the respective national legislations.

3. From an administrative point of view, money-laundering is dependent on the laundered property being derived from:

(a) Criminal activities related to toxic or narcotic drugs or psychotropic substances;

(b) Criminal activities related to armed bands or organizations or terrorist groups;

(c) Criminal activities pursued by organized bands or groups.

Paragraph 2

4. Subparagraph (b) reads: "It may be provided that the offences set forth in that paragraph do not apply to the persons who committed the predicate offence".

5. The legal definition of the offence of money-laundering generally establishes as criminal acts the acquisition and utilization of property or profits from a particular criminal activity, so that such acts form a special category of the offence of receiving.

6. This statutory offence of receiving requires that the offender should not have taken part in the criminal act, either as perpetrator or accomplice; that such person should be aware of the fact that an offence has been committed; and that he or she should make personal use of the illegally acquired assets.

7. Those requirements are identical to those contained in the definition of money-laundering, the sole difference being that, in the latter, the illegally acquired assets may be for personal use or for the use of a third party. That implies that the elements required for constitution of the offence of money-laundering can be summarized as follows:

(a) Previous commission of an offence;

(b) Non-participation by the receiving party in the offence as either perpetrator or accomplice;

(c) Knowledge of the offence committed; and

(d) Personal use or use by a third party of the illegally acquired assets.

8. In the light of the above, Spain considers that the reference in subparagraph (b) should be deleted in view of the fact that, in many legislations, the person who committed or took part in the prior criminal activity in question may not be charged with the offence of money-laundering in respect of assets deriving from that offence.

Paragraph 3

9. Subparagraph (a) reads: "Ought to have assumed that the property was the proceeds of crime". The wording "ought to have assumed" allows for the possibility that States Parties define the offence of "negligent laundering" in their domestic legislations but in relation solely to who does the laundering, namely, the offender.

10. Regarding that question, Spain is of the view that it would be preferable to use the formula set out in the first point of the present document, in which reference is made to the possibility of providing a generic definition of the offence of money-laundering committed through negligence, whereby not only should the person who performed the act of money-laundering have assumed or supposed that the property was the proceeds of an offence, but the bank and financial operatives concerned should also have been expected to have made that assumption.

Paragraph 4

11. Subparagraph (a) reads: "A person convicted as a member of organized crime shall prove the legality of the purchase of goods that belong to him [or her] or in respect of which he [or she] acts as owner, otherwise they shall be confiscated".

12. This point clearly presupposes the possibility of including in States Parties' legislations what is termed "reversal of the burden of proof", which is not admissible in many constitutional systems, since the presumption of innocence is a fundamental right guaranteed by many constitutions.

13. Consequently, this option is not possible in many legal systems. However, that does not rule out the possibility of this presumption being essentially nullified by the presence of other means of proof, not only direct but also indirect, or based on presumptions, the latter being termed "circumstantial evidence".

14. In the view of Spain, circumstantial evidence must conform to the following principles:

(a) There must be more than one item of evidence, and if there is only one, it must have exceptional evidentiary force;

(b) Items of evidence must be concomitant and have an unambiguously incriminating character;

(c) Items of evidence must be closely interrelated;

(d) There must exist a specific and direct connection between the evidence and the central offence which it is sought to prove through a process of deduction based on experience and the rules of logic.

Article 4 *bis*
Measures to combat money-laundering

15. The list of measures proposed in the draft Convention is already included in Spanish and European Community legislation.

16. In this regard, it should be pointed out that the list given in the draft Convention with respect to the term "financial institution"[1] is incomplete, it being considered that it should also include, as parties subject to the regime, a further group of institutions or establishments engaging in professional or business activities particularly susceptible to use for the purposes of money-laundering, such as the real estate business, activities relating to the trade in jewellery and precious stones and metals, the trade in works of art and antiquities, and investment in stamp and coin collections.

17. The possibility should also be explored of devising a mechanism for extending the scope of the standard to other institutions that, while not expressly specified, could be used by individuals seeking new ways of performing money-laundering operations. Such institutions could include cash-carrying services, pawnbrokers and currency-exchange bureaux.

Article 7
Confiscation

Paragraph 1

18. Subparagraph (a) refers to confiscation of property the value of which corresponds to that of such proceeds. In many legislations, confiscation is defined not as a penalty but as an incidental consequence, imposition of which requires the fulfilment of two conditions: (a) conviction of a person on the charge of committing a principal offence; and (b) complete assurance that the object to be confiscated is the property of that person.

19. Confiscation may be applied to the assets acquired through commission of an offence, the instrumentalities used in its commission or the profits derived from the offence, whatever transformations they may have undergone. Consequently, many legislations do not provide for confiscation of the equivalent value of the original object.

[1] See footnote 36 of the draft Convention, which indicates what is denoted by "financial institution".

20. This gap in the law precludes consideration of the formula set out in subparagraph 1 (a) in which reference is made to "property the value of which corresponds to that of such proceeds".

Paragraph 2

21. In paragraph 2, reference is made to "freezing". This expedient is unknown in many legal systems in the context of confiscation. Naturally, those systems provide for the attachment of property, but their purpose differs radically from that of confiscation. Confiscation implies the transmittal of ownership of a thing to the State, whereas freezing of property is aimed at ensuring the discharge of certain responsibilities, essentially within the scope of civil law.

Paragraph 5

22. Paragraph 5 refers to disposal for specific purposes of the proceeds of property acquired through the offence. As regards the possible creation of a fund derived from property confiscated in connection with drug trafficking and other related offences, Spain is of the view that there should be certain specific purposes for which such a fund should be designated, such as the following:

(a) Creation of programmes for the prevention of drug dependence and provision of care for drug-dependent persons and for facilitating their social rehabilitation and reintegration into the labour force;

(b) Intensification and improvement of activities aimed at prevention, investigation, prosecution and punishment of the offences referred to in Law 36/95 (on drug trafficking and related offences).

23. With regard to the provision concerning the possibility of "sharing with other States Parties ..." (see subparagraph b (ii)), it should be stated that many legislations do not allow for such a possibility, but rather only provide for payment of part of the net profits obtained through sale of the property—under no circumstances the property itself—into international cooperation programmes related to programmes for the prevention of drug dependence and for the rehabilitation and social reintegration of drug-dependent persons.

Sweden

[Original: English]

Firearms protocol to the United Nations Convention against Transnational Organized Crime

Sweden welcomes Canada's initiative. Sweden's preliminary and overall response to the Canadian draft is positive.

The purpose and scope of the draft Protocol with respect to the types of issues that are appropriate for discussion look good. The preamble to the instrument looks very good. The fact that judicial cooperation is dealt with only marginally is also a positive feature; such provisions are better framed in general terms and should therefore be included in the Convention. The draft is multidisciplinary and therefore highly appropriate for a protocol.

The draft Protocol highlights the States Parties' concern over the firearm issue and the fact that the matter needs to be tackled from different perspectives.

From the Swedish point of view, it may, however, be necessary to include exceptions and other amendments in the proposed articles during the forthcoming work. Some aspects in the draft, for example, would require legislative changes in Sweden and consequently specific parliamentary approval. While that would have to be approached with care, our initial reaction to those elements can be described as cautiously positive.

A number of questions have been left outstanding and/or depend on what may be agreed on with regard to the Convention itself. That naturally makes it difficult to give an opinion on those questions and other details. It is, however, good that the text—and in particular the footnotes—so clearly highlight the connection of the Protocol with the Convention and that special provisions are intended to be included in the Protocol only when the general provisions in the Convention prove to be insufficient or inapplicable for the purposes of the Protocol.

One general point is that there is perhaps a need to go over the proposed articles and look at—and perhaps distinguish between—what should apply to major transports of arms for export etc. and what should apply to cases where, for example, a single weapon is conveyed across a border by its legitimate owner.

Some points that can be made already, before the next stage of the work, are presented below.

Preambular paragraph (b) mentions the increase in the illicit manufacturing of and trafficking in firearms etc. The evidence of that increase should perhaps be quoted or at least mentioned.

In article II (Definitions), paragraph (b), on "Controlled delivery", is unnecessary if the Protocol does not contain provisions concerning controlled deliveries (cf. the note on the last page of the draft). If there are to be such provisions, then they belong in the Convention. The use of controlled deliveries is controversial in Sweden. Provisions concerning controlled firearm deliveries could cause difficulties for us.

Concerning article II, paragraph (e), it is perhaps unclear how the words "if any one of the States Parties concerned does not authorize it" should be interpreted. If a permit is required for each individual case, that could cause difficulties in Sweden. If, on the other hand, authorization can be granted through general provisions in the States concerned and/or follow as a result of agreements between States (or supranational instruments), there will be no problem for Sweden.

Provisions concerning criminalization are appropriate in the Protocol but less so in the Convention.

While our preliminary reaction is positive, the proposed article V, paragraph 1 (b), may require legislative changes in Sweden. If so, the question must naturally be considered at the national level before Sweden's position can be more fully stated.

The illicit export and import of firearms are punishable in principle in Sweden under the Law on Penalties for the Smuggling of Goods (in certain cases connected with the European Union, special rules apply and the penalty is a fine or six months' imprisonment for the smuggler). Attempt and participation in the smuggling of goods are normally punishable under chapter 23 of the Swedish Penal Code. However, preparation and conspiracy are punishable only when narcotics are involved. Despite the reservations concerning "basic concepts of the legal systems ..." etc., it may be necessary to discuss—

at least with respect to different forms of illicit trafficking according to the definition in article II, paragraph 5—the type of participation etc. that should carry a penalty.

Articles VI and VII are very preliminary and are dependent on the final drafting of the Convention. Sweden's preliminary response is positive, without committing ourselves to details. With respect to the forfeiture provisions in article VII, the question should perhaps be asked whether paragraph 1 is really necessary. It may be a measure that should follow from or be regulated in the Convention. Article VII, paragraph 2, however, seems to be "firearms-specific" and therefore belongs in the Protocol. Sweden's preliminary reaction is that regulation seems reasonable.

Concerning article IX, paragraph 1, Sweden does not today require the marking of, for example, imported firearms. Consideration and discussion may be needed here (as exceptions may be necessary in some cases, such as collectors' items). It might also be the case that it is sufficient for a firearm to be marked in such a way as to enable identification: information concerning the importer and previous owners could instead be registered in the firearms register or its equivalent. The objectives of the provisions can undoubtedly be achieved in different ways appropriate to the legislative systems of different countries.

The provisions in article XIV, paragraph 3, concerning cooperation in the tracing of firearms, belong more to "judicial cooperation" and should not, therefore, come under "Exchange of information". Furthermore, it may be necessary to consider whether a "firearms-specific" provision on tracing is needed. Perhaps such a provision should be in the Convention instead. That question could be considered in future work.

Article XV, paragraph 1, does not seem to add much and is covered in substance in article III. Perhaps a general provision on bilateral and regional cooperation does not add anything. Paragraph 2 may be difficult to realize in view of the multidisciplinary area of application. Perhaps the contact point's area of responsibility can be made more precise through a reference to some of the articles where there is a tangible need for a contact.

Article XVII, concerning confidentiality, could perhaps be rewritten (the first line mentions constitutions and international agreements, whereas line 4 refers to "legal reasons", which could be something else). Another proposal that could require legislative change in Sweden is the one that authorizes the entity responsible to make information publicly available without first informing the State Party providing the information.

On article XVIII (Technical assistance), we feel that the provisions need to be made more precise.